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No. 82-

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STEERE TANK LINES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below erred by engrafting upon the provisions of the Motor Carrier Act of 1980 providing for removal of restrictions and broadening commodity descriptions a requirement found only in the provisions governing the issuance of new certificates for motor carrier operating authority, thus frustrating the intent of Congress in one of the single most important provisions of the Act.

2. Whether the court below improperly substituted its judgment for that of the Commission as to what constitutes a reasonable broadening of unduly restrictive motor carrier operating certificates.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 666 F.2d 255. The opinion of Division 1 of the Commission (App. E, *infra*, 15a) is unreported. The opinion of the Restriction Removal Board of the Commission (App. D, *infra*, 11a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 7a-8a) was entered on January 25, 1982. The Commission's timely petition for rehearing was denied on March 8, 1982 (App. C, *infra*, 9a-10a). The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of 49 U.S.C. 10101 and 10922, and 49 C.F.R. 1137 *et seq.*, are set forth at App. F, *infra*, 17a-39a.

STATEMENT

1. The passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) instituted a new era in the regulation of the motor carrier industry. As stated in Section 2 of the Act (Purpose of the Act), the new legislation was designed to "reduce unnecessary regulation by the Federal Government." Congress intended the Motor Carrier Act of 1980 to reform the inefficient and restrictive regulatory structure that had developed since the inception of Federal motor carrier regulation in 1935. See, *e.g.*, S. Rep. No. 96-641, 96th Cong., 2d Sess. 2-3 (1980); H. Rep. No. 96-1096, 96th Cong., 2d Sess. 2-3 (1980). In its attempt to correct the regulatory quagmire that had grown around the motor carrier industry, Congress amended the National Transportation Policy, 49 U.S.C. (Supp. III) 10101, with respect to the regulation of motor carriers of property, see Pub. L. No. 96-296, § 4, 94 Stat. 793-94, codified at 49 U.S.C. (Supp. IV) 10101(a), and revised and liberalized the standards for entry into the motor carrier industry in Section 5 of the Motor Carrier Act, codified at 49 U.S.C. (Supp. IV) 10922(b).

As a corollary to the liberalized entry standards, and of particular significance to this case, Congress enacted a new section to enable existing motor carriers of property to remove restrictions and broaden unduly narrow limitations that are found in their present operating authorities. Pub. L. No. 96-296, § 6, 94 Stat. 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h). This new section required the Commission

to establish procedures for the speedy processing of applications by carriers to remove restrictions and to expand the categories of commodities that can be transported under their certificates and permits.[1] Congress provided that the Commission should process restriction removal applications expeditiously and enumerated specific factors to be considered in granting or denying a restriction removal or authority broadening application. See 49 U.S.C. (Supp. IV) 10922(h)(2).

The Commission's rules and guidelines implementing 49 U.S.C. (Supp. IV) 10922(h) are found at 49 C.F.R. 1137 *et seq.* Along with procedures for processing restriction removal applications, the Commission developed guidelines for broadening commodity descriptions and removing territorial restrictions. For example, the guidelines provide guidance for broadening one or more named commodities in existing certificates to, *inter alia*, "a broader class descrip-

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[1] The Commission's implementation of the provisions of 49 U.S.C. (Supp. IV) 10922(h) may be found in the rules and guidelines promulgated in Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property*, 132 M.C.C. 374 (1980), codified at 49 C.F.R. 1137 *et seq.* Certain provisions of those guidelines, but not the procedural rules, were remanded for reconsideration by the Commission in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981). A Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been filed seeking review of that decision and the Writ of Mandamus issued by the court of appeals (*American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982)) to enforce its mandate in that proceeding. See *Interstate Commerce Commission* v. *American Trucking Associations, Inc.*, No. 82- (filed July 16, 1982).

tion generally accepted by the Commission, such as commodities in bulk . . ." 49 C.F.R. 1137.21(b)(3). This type of broadening was considered reasonable where the carrier was already performing bulk service, and, by broadening one bulk commodity to all commodities in bulk, the carrier was merely expanding within its field of service to provide complete service consistent with the Congressional concerns expressed in the Congressional Findings sections of the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3 (a), 94 Stat. 793. See generally Ex Parte No. MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property*, 132 M.C.C. 374 (1980), *aff'd in part, rev'd in part sub nom. American Trucking Associations, Inc.* v *ICC*, 659 F.2d 452 (5th Cir. 1981).

2. In January 1981, soon after the Commission's rules and guidelines for restriction removal applications became effective, The Maxwell Company (Maxwell) applied to the Commission, *inter alia*,[2] to broaden the commodity description in one of its existing certificates from "spent silica gel catalyst, in bulk" to "commodities in bulk."[3] Maxwell provided all of the information required by 49 U.S.C. (Supp. IV) 10922(h)(2) and the Commission's rule implementing

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[2] Maxwell also sought to broaden the territorial scope of its certificate by removing restrictions against service involving named cities and states. This territorial restriction removal was not challenged by any parties to the proceeding.

[3] Maxwell's existing certificate authorizing the transportation of "spent silica gel catalyst, in bulk" restricted it to the transportation of only that one commodity. Spent silica gel catalyst is a commodity in general usage in the petroleum processing industry, and is used by petroleum refineries to convert raw petroleum products into fuel products.

that section, 49 C.F.R. 1137.10(c), and submitted a copy of its existing certificate. Notice of the application was published in the *Federal Register*, and in response, two carriers (Steere Tank Lines, Inc., and Ruan Transport Corporation) filed comments.[4] Both commenting carriers objected to the commodity broadening, asserting that it was not reasonable as contemplated by Congress under 49 U.S.C. (Supp. IV) 10922(h).

The Commission's Restriction Removal Board, an employee review board empowered to decide restriction removal cases under 49 C.F.R. 1011.6(*l*), concluded that the application should be granted. (App. D, *infra*, 11a-13a). The Board made findings that the proposed broadened operations "will reduce the consumption of energy resources, will offer potential cost savings and improved efficiency, will enable applicant to provide full service to a broader range of shippers and in rural communities, and will be consistent with the provisions of the transportation policy set forth in 49 U.S.C. 10101(a)," as required by 49 U.S.C. (Supp. IV) 10922(h)(2). (App. D, *infra*, 12a).

3. Although Restriction Removal Board decisions are administratively final, and appeals are allowed only under extraordinary circumstances, see 49 C.F.R. 1137.14(c), Steere sought reconsideration of the Board's decision, asserting that the Commission's action exceeded the agency's jurisdiction under 49 U.S.C. (Supp. IV) 10922(h). The Commission, by Division 1, concluded that no extraordinary circumstances existed, and denied the appeal. (App. E, *infra*, 15a).

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[4] 49 U.S.C. (Supp. IV) 10922(h)(2) provides that interested parties should have the opportunity "to comment" on restriction removal proposals.

4. On judicial review, decided under the court of appeals' summary calendar procedures without oral argument, the court remanded the proceeding to the Commission for reconsideration in light of its decision in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981). (App. A, *infra*, 2a-6a). The court declared that its decision in *American Trucking Associations, supra*, required that Steere's petition for review be granted (*id.* at 3a).

The court observed that Maxwell's restriction removal application mirrored the Commission guidelines (49 C.F.R. 1137.21(b)) that were found invalid in *American Trucking Associations, supra* (App. A, *infra*, 4a).[5] The court of appeals did recognize that the description in Maxwell's certificate "was an example of the overly-restrictive certificates that Congress condemned in the Motor Carrier Act." (App. A, *infra*, 5a). However, the court noted that the expanded certificate would enable Maxwell to haul all commodities in bulk, and "[i]t is likely that Maxwell . . . is either unversed or uninterested in hauling many" of those goods (*ibid.*). The court continued (*ibid.*):

> The record contains no evidence to support a conclusion that the carrier is "fit, willing, and able to provide the transportation authorized by the certificate." 49 U.S.C.A. § 10922(a)(1)(A).

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[5] The court discussed its *American Trucking Associations* decision, reiterating that in *American Trucking Associations* the restriction removal guidelines were found invalid because they failed to take into account a carrier's fitness, willingness, and ability to perform the transportation authorized by its broadened certificate, 659 F.2d at 464, and because a carrier must be permitted to deviate from the suggested guidelines, 659 F.2d at 464-65. (App. A, *infra*, 4a-5a).

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing, and able to provide the transportation for which it is seeking authority.

As the court perceived it, the Commission had failed to reasonably broaden Maxwell's certificate because the agency had not considered the carrier's fitness, willingness, and ability to perform every conceivable facet of the operations which would be authorized by its certificate as expanded (App. A, *infra*, 6a). In fact, Steere had not raised before the court of appeals (or the Commission) the question of Maxwell's fitness, willingness, and ability (see 49 U.S.C. (Supp. IV) 10922(b)(1)(A)) to perform operations under the broadened certificate, but instead had asserted that Maxwell had not established a public need for the service (see 49 U.S.C. (Supp. IV) 10922(b)(1)(B)). The Court did not rule on this contention, but rather based its holding upon Maxwell's failure to establish a *prima facie* case that it was fit, willing, and able to transport all of the commodities which could be transported under its expanded certificate.

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision requiring a carrier to establish its fitness, willingness, and ability as part of its *prima facie* case in seeking to remove a restriction or broaden a commodity description is contrary to the spirit and purpose of the Motor Carrier Act of 1980, will seriously hinder the effective administration of the Act, and presents important and recurring questions warranting this Court's review.

The Motor Carrier Act of 1980 gave the Commission clear and explicit instructions regarding the re-

moval of restrictions and the broadening of commodity descriptions in the existing certificates held by motor carriers of property. The action of the court of appeals violates the spirit and the letter of those instructions. Pursuant to 49 U.S.C. (Supp. IV) 10922(h)(1)(B)(i), a motor carrier may seek to "reasonably broaden the categories of property authorized by [its] certificate or permit." In determining whether such an application should be granted, the statute (49 U.S.C. (Supp. IV) 10922(h)(2)) provides standards that the Commission should consider:

> In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101 (a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

The requirements of 49 U.S.C. (Supp. IV) 10922(h)(2) are the sole considerations that Congress directed the Commission to take into account in deciding whether to grant or to deny a restriction removal application; no others were directed by Congress, although the Commission is authorized, in its discretion, to consider "other things".

The specific considerations for restriction removals established by Congress in 49 U.S.C. (Supp. IV) 10922(h)(2) directly reflect Congress' concerns that the myriad of restrictions on existing operating authorities hampered efficient motor carrier operations. Under 49 U.S.C. (Supp. IV) 10922(h)(2), the Commission must consider, *inter alia*, the effect on energy

resources, cost savings, improved operating efficiency, and the effect on service to small and rural communities. These are precisely the public interest factors that Congress believed were abandoned in favor of protective regulatory practices prior to the 1980 legislation. See, *e.g.*, Pub. L. No. 96-296, § 3(a), 94 Stat. 793 (Congressional Findings); S. Rep. No. 96-641, 96th Cong., 2d Sess. 3, 7 (1980); H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3, 17-18 (1980).

Section 10922(h)(2) is precise in setting forth considerations the Commission must take into account in restriction removal applications. The tripartite test of fit, willing, and able is not among these factors. That test is found at 49 U.S.C. (Supp. IV) 10922(b)(1)(A) (the provision governing applications for new authority), but not in 49 U.S.C. (Supp. IV) 10922(h)(2). The court of appeals, by engrafting the tripartite test from a separate section on the restriction removal section, impermissibly rewrote the statute in a manner not intended by Congress. See, *e.g.*, *United States* v. *American Trucking Association, Inc.*, 310 U.S. 534, 543-44 (1940). It is a basic rule of statutory construction that "when a term is carefully employed in one place and excluded in another, it should not be implied where excluded." *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514-15 (1963); *American Trucking Associations, Inc.* v. *ICC*, 672 F.2d 850 (11th Cir. 1982). See *United States* v. *Sisson*, 399 U.S. 267, 298 (1970). Had Congress meant a carrier's fitness, willingness, and ability to be a consideration in restriction removal applications, it easily could have and should have said so, as it did in reference to new authorities. See *Ferguson* v. *Skrupa*, 372 U.S. 726 (1973); *American Trucking Associations, Inc.* v. *ICC*, *supra*, 672 F.2d at 853.

It is beyond question that Congress mandated the expeditious processing of restriction removal applications in simplified proceedings, unencumbered by the requirements attendant to applications for new authority. See *American Trucking Associations, Inc.* v. *ICC, supra*, 659 F.2d at 460-61. Compare 49 U.S.C. (Supp. IV) 10922(h)(2) (considerations for restriction removal applications and a 120 day time limit for processing applications) with 49 U.S.C. (Supp. IV) 10922(b) (considerations for new authority applications) and 10322(b)(1), (d) and (f) (270 day time limit for processing new authority applications). By engrafting a requirement not found in section 10922(h)(2) onto the considerations the Commission must take into account in considering restriction removal applications, the court of appeals increased the burden on the Commission in a manner not intended by Congress, thus intruding on the Commission's administration of the Motor Carrier Act of 1980.

By inserting the tripartite "fit, willing, and able" test of 49 U.S.C. (Supp. IV) 10922(b)(1)(A) into the restriction removal proceedings under 49 U.S.C. (Supp. IV) 10922(h), the court of appeals also placed a significant limitation on the Commission's ability to implement the policies of the Motor Carrier Act of 1980 and to administer the Act and Congress' policies. The court's action contravenes important Congressional policies regarding the regulation of the national motor carrier system. The Interstate Commerce Commission is charged with regulating the motor carrier industry consistent with the National Transportation Policy and the policy directives of Congress. More specifically, Congress set out in the Motor Carrier Act of 1980 to free the motor

carrier industry from (Pub. L. No. 96-26, § 3(a), 94 Stat. 793 (Congressional Findings)):

> the existing regulatory structure [that] has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; [and the] protective regulation [that] has resulted in some operating inefficiencies and some anticompetitive pricing . . .

By adding a factor not contemplated by Congress to restriction removal proceedings, the court of appeals may significantly impede the Commission's ability to meet these concerns and to implement national transportation policies.[6] See *Central Freight Lines, Inc.* v.

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[6] One possible way that Congress' intent may be frustrated is the apparent blurring by the court of appeals of the distinction between applications for new operating authority and for the removal of restrictions from existing authorities. Congress established restriction removal proceedings as an expeditious method of removing from existing operating authorities restrictions that result in operating inefficiencies or wasted energy resources, or prevents service to small and rural communities. See 49 U.S.C. (Supp. IV) 10101(a)(7) and 10922(h)(2). By engrafting the fit, willing, and able test found at 49 U.S.C. (Supp. IV) 10922(b)(1)(A), the court placed on a restriction removal applicant an added burden that will impede the expeditious removal of restrictions that so troubled Congress.

Moreover, the court of appeals could, logically and consistently with its decision in this case, next require a restriction removal applicant to demonstrate that its proposal "will serve a useful public purpose, responsive to a public demand or need." 49 U.S.C. (Supp. IV) 10922(b)(1)(B). Such an action would completely emasculate the restriction removal section, turning it into the equivalent of an application for new authority. Thus, one of the most important sections of the Motor Carrier Act of 1980 would be rendered useless.

United States, 669 F.2d 1063, 1071-72 (5th Cir. 1982), where a different panel of the same court of appeals recognized that requiring a full analysis of operational feasibility in every motor carrier application, a factor not specifically mandated by the statute, would frustrate the policies and goals of the Motor Carrier Act of 1980.

2. The action of the court of appeals further impedes the Commission's implementation and administration of the Motor Carrier Act of 1980 by substituting the judgment of the court for that of the Commission in determining what constitutes a reasonable broadening of commodity descriptions under the restriction removal section, 49 U.S.C. (Supp. IV) 10922(h)(1)(B)(i).

In its implementing rules and guidelines, 49 C.F.R. 1137 *et seq.*, the Commission determined what would be considered a reasonable broadening of commodity descriptions in existing certificates. In *American Trucking Associations, supra*, 659 F.2d 452, the court of appeals found that those guidelines, if used without the opportunity for deviation, could compel an applicant to seek a broadening of its authority beyond its desires or capabilities. That problem is not presented on the present record because Maxwell had made clear its desire to obtain a broadening of its existing certificate which would authorize it to expand its field of service so as to provide a complete bulk service. Thus, in overturning the Commission's broadening of Maxwell's commodity description in this proceeding, the court of appeals went beyond its holding in *American Trucking Associations, supra*, 659 F.2d 452. Its holding here suggests that a carrier which has been transporting a single commodity within a field of service (such as transportation of

commodities of bulk) cannot as a matter of law obtain a broadening of the commodity description in its certificate to encompass the entire field of service. Similarly under this decision a carrier transporting a single commodity may be foreclosed from broadening this authority to include all commodities within the various classifications adopted by the Commission and which the court of appeals in the *American Trucking Associations* decision found to be "a good starting point" in effecting the Congressional purpose of eliminating unduly narrow certificates. This concern is heightened by the fact that the court of appeals in its mandamus decision clarifying its October 1, 1981, *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982), mandate, which is the subject of a separate petition for certiorari in No. 82- (filed July 16, 1982), explicitly held with respect to grants of new authority that "the Commission . . . may not assume that an applicant fit, willing, and able to carry one commodity in an STCC classification, is fit, willing and able to carry all commodities in that classification" (669 F.2d at 963).

Congress clearly vested jurisdiction in the Commission to determine whether a restriction removal is reasonable. It required that an expeditious procedure for processing requests by existing carriers be established. In an effort to comply with these requirements the Commission set forth guidance to potential applicants as to what would generally be considered a reasonable broadening so as to facilitate framing and consideration of the applications. It is not the province of the court of appeals to substitute its judgment for that of the Commission as to the scope or procedures to be followed in complying with this

Congressional mandate. *E.g.*, *Ralston Purina Co.* v. *Louisville & N.R.R. Co.*, 426 U.S. 476, 477 (1976); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). Yet that is exactly what the court of appeals did. Moreover, as this Court recently observed, "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). By substituting its judgment for that of the Commission, the action of the court of appeals improperly rejects the Commission's construction of the statute and undermines the Commission's implementation and administration of this important section of the Motor Carrier Act of 1980.

The court below has frequently recited the proposition that implementation of the various provisions of the Motor Carrier Act of 1980 is for the Commission. Thus in the proceeding below the court of appeals stated (App. A, *infra*, 6a):

> We do not suggest that such a showing [of fitness] must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

At the same time the court has cast such a cloud upon the validity of the procedures at the heart of the Commission's implementation of the restriction removal provisions of the Act as to render them useless.

CONCLUSION

The petition for a writ of certiorari should be granted.[1]

Respectfully submitted.

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[1] The Court may wish to consider consolidation of this proceeding with *Interstate Commerce Commission* v. *American Trucking Associations, Inc.*, No. 82- (petition for certiorari filed July 16, 1982), which involves similar issues concerning the Motor Carrier Act of 1980.